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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1207

DAVID BAYLESS, *et al.*,

*Petitioners,*

—v.—

FLOYD MARTINE, Dean of Students, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

**No.** .....

DAVID BAYLESS, *et al.*,

*Petitioners,*

—v.—

FLOYD MARTINE, Dean of Students, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on November 22, 1971.

### Citation to Opinion Below

The *per curiam* decision of the United States Court of Appeals is reported at 451 F.2d 561 and is set out in the Appendix, *infra* at p. 27a. The earlier opinion of the Court of Appeals, affirming the denial of preliminary injunctive relief and vacating a previously issued stay, is reported at 430 F.2d 873 and is set forth in the Appendix, *infra* at pp. 6a-23a. The two decisions of the United States District Court for the Western District of Texas, denying preliminary and then permanent relief, are unreported and are

respectively set forth in the Appendix, *infra*, at pp. 1a-2a and 24a-26a.

## Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 22, 1971. On February 12, 1972, Mr. Justice Powell granted an extension of time in which to file this petition to and including March 21, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

## Questions Presented

1. Whether a public university may suspend students for participating in an outdoor, silent, peace vigil for the reasons that:

   (a) it was held at a time and in an area unauthorized by university regulations and expressly forbidden by school officials;

   (b) university officials allegedly feared a possibly hostile reaction from onlookers; and

   (c) the onlookers might make noise distracting to classes in adjacent buildings.

2. Whether a university "student expression area" regulation, pursuant to which the petitioners were purportedly suspended, is defective under substantive and procedural First Amendment standards.

## Statement of the Case

On November 13, 1969, the petitioners were all students at Southwest Texas State University, a public university in San Marcos, Texas, with approximately ten thousand students. On that date they were ordered suspended by the Respondent Martine, Dean of Students, until September 1970. App., *infra*, p. 11a. At the time of their suspension the petitioners were conducting a silent vigil as part of the nation-wide Vietnam Moratorium. App., *infra*, pp. 6a-7a.

At approximately 9:45 A.M., the petitioners and others had gathered on a grassy area of the campus, near the Huntington Statue. They intended to maintain their vigil from 10 A.M. until 2 P.M. Initially, there were approximately fifteen participants and thirty onlookers (T. 15, 18*).[1] There was no dispute about the petitioners' conduct: "They intended to be and were silent until the time of their suspensions. They had caused no injury to property themselves. They had attracted a crowd of onlookers." App., *infra*, p. 11a. The Dean testified that the petitioners were quiet, peaceful, orderly and were not disrupting traffic (T. 52).

The Dean arrived at approximately 10:00 A.M. He informed the petitioners that they were violating a University regulation which designated a "student expression area"

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* "T." refers to the transcript of the hearing on a preliminary injunction.

[1] A newsman covering the event testified that when he first arrived he thought "absolutely nothing was taking place" and felt "hard-pressed to find the demonstration" (T. 15).

and that they had been told not to hold their demonstration at 10:00 A.M. by the Statute. App., *infra*, p. 11a. After warning them that they would be suspended if they remained, the Dean left the area to allow the petitioners the opportunity to depart.[2] *Ibid.* When the Dean returned a short while later, the ten petitioners were still seated. The Dean warned them again and when they refused to leave, they were suspended. App., *infra*, p. 11a (T. 88-89).

In suspending the petitioners on the ground that their vigil was being conducted at an improper time and place, the Dean was purportedly relying upon the University's "Student Expression Area" regulation:

> "STUDENT EXPRESSION AREA
>
> Students and University personnel may use the Student Expression Area located on the grass terraces in front of Old Main between the hours of 12:00 noon to 1:00 p.m., and from 5:00 to 7:00 p.m. Reservations

[2] By the time the Dean had left, the crowd swelled to over two hundred persons, almost all onlookers. It is difficult to determine whether the crowd gathered to watch the demonstration or to watch the confrontation between the Dean and the petitioners (see T. 18, 86). One teacher testified that there was no significant noise until the Dean arrived, and that all the noise emanated from the onlookers (T. 151).

The crowd of onlookers was within a few feet of an adjacent classroom building (T. 19). The Dean testified that he saw some students looking out the windows to see what was happening (T. 87). One teacher complained that his class was distracted by the noise outside (T. 134), but another confirmed that all the noise came from the onlookers (T. 144). When asked whether the petitioners' actions materially and substantially interfered with the school activities, the Dean replied:

> Well, sir, that would be a hard question to answer. If you ask if they themselves caused a disturbance by yelling or something, no, sir. I do think they caused a disturbance by holding the meeting there that we had not authorized, because of the fact that it did draw such a large crowd and, therefore, caused a commotion (T. 98).

for the Student Expression Area are made through the Dean of Students Office and must be made at least 48 hours in advance.

Rules to be observed by users of the area include:

1. No interference with the free flow of traffic.

2. No interruption of the orderly conduct of University affairs.

3. No obscene materials.

4. Person making the reservation is responsible for seeing that the area is left clean and in a good state of repair.

When a registered student organization plans to invite a non-University person to address a meeting, his name must be submitted to the Dean of Students Office at least 48 hours before the event."

The University president testified that he had never seen the area used (T. 26).

In applying this regulation to the petitioners' demonstration, the Dean testified that he was motivated by two factors, (1) the possible disruption of classes, and (2) the concern over protecting the petitioners from other groups who were antipathetic to their views (T. 73, 79-81).[3] Ac-

[3] The Moratorium group had conducted its first activities the previous month, on October 15. After hearing speeches in an auditorium, many of the demonstrators, without authorization, gathered at the Huntington Statue area to continue their protest for approximately an hour. App., *infra*, p. 7a. The Dean testified that he received complaints from students and faculty about the disruption of classes (T. 77-78). The University was also concerned because Moratorium activities were supposed to be held each month, a factor heavily relied upon by the Court of Appeals. App., *infra*, pp. 8a, 13a.

cordingly, when he learned that the petitioners were planning their vigil from 10:00 A.M. until 2:00 P.M. in the Huntington Statue area, he discussed the matter with certain of them. He suggested that they hold their demonstration after 4 P.M. and proposed certain indoor facilities, which all proved to be unavailable (T. 116-17).[4] The petitioners felt that any demonstration after 4:00 P.M. would have been ineffective because most of the students would have already gone home, and there would have been "virtually nobody" on the campus (H. 7). They chose the Statue area because it was "away from classes as much as possible, and also, at the same time, there was student traffic, so the students would be able to see us" (H. 26). Thus, feeling that the University's directive was an abridgment of their First Amendment rights, the petitioners decided to continue their plans and allow each person to decide whether or not he would participate (H. 19-20). The petitioners did, and their suspension ensued.

Following an administrative hearing, the petitioners' suspension was approved, App., *infra*, pp. 9a-10a. They immediately filed the instant civil rights action, pursuant to 42 U.S.C. Section 1983, seeking, *inter alia*, an injunction against their continued suspension and a declaration that the "student expression area" regulation was overbroad and an impermissible prior restraint on freedom of expression and assembly. Following a hearing, the United States District Court for the Western District of Texas (Roberts, J.) denied a preliminary injunction, holding that the Uni-

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[4] There was testimony that the Dean had told one student, John Pfeffer, that the group could use the Statue area but only from 12 to 1 o'clock (T. 120). But that offer was not communicated to the group's leadership (H. 6-7).

["H. ——" refers to the transcript of the hearing on a permanent injunction.]

versity had imposed "reasonable regulatory requirements as to time and place of student protest and demonstration". App., *infra*, pp. 1a-2a. Thereafter, a panel of the Fifth Circuit granted a stay of the suspension pending the disposition of the appeal. *Bayless* v. *Martine*, 430 F.2d 872; App., *infra*, pp. 3a-5a.

In June 1970, the Fifth Circuit entered its opinion, holding that the District Court had not abused its discretion, vacating the stay issued earlier and remanding the case to the District Court for further proceedings. App., *infra*, pp. 6a-23a. There was disagreement, however, as to the reasons for the decision. The majority opinion held (1) that the respondents had acted reasonably in balancing the interests involved, (2) that the "student expression area" rule was a valid exercise of the University's right to adopt and enforce "reasonable, non-discriminatory regulations as to the time, place and manner of student expressions and demonstrations", App., *infra*, p. 14a, (3) that the petitioners were suspended because they had violated the rule, not on the basis of an *ad hoc* administrative determination and (4) accordingly, the silent, non-disruptive nature of the demonstration was irrelevant because the petitioners had violated "a general standing campus regulation valid on its face." App., *infra*, p. 15a.

Judge Thornberry concurred, but on different grounds. He thought that the petitioners' actions could not be considered a violation of the regulation because its specifications of time and place were permissive, not prohibitive. App., *infra*, p. 19a. He noted that if construed to be applicable to petitioners, then the regulation presented serious problems of vagueness and overbreadth. App., *infra*, p. 20a. Rather, he viewed the Dean's decision as an *ad hoc* deter-

mination, but one which was justified under the circumstances, since the Dean's order did not prohibit the students from holding their demonstration, "but merely regulated the time and place at which that demonstration could be held." App., *infra*, p. 20a. He felt that the Dean had made a "real effort" to accommodate the petitioner's demands with the needs of the University, and that his decision was reasonable.

The petitioners returned to the District Court and a further hearing was held, following which the court denied relief, relying on the earlier Court of Appeals decision. App., *infra*, pp. 24a-26a. The petitioners appealed, and the Court of Appeals summarily affirmed, citing its earlier decision. App., *infra*, p. 27a. It is to review this judgment that the petitioners seek certiorari.[5]

## Reasons for Granting the Writ

The decision below—upholding a college regulation of First Amendment activities which is seriously deficient under applicable standards and allowing severe punishment for pristine and passive expression of opinion—reflects two related phenomena. First, it demonstrates a persistent reluctance in many decisions to honor fully the principles enunciated in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). See e.g., *Guzik* v. *Drebus*, 431 F.2d 594 (6th Cir. 1970), *cert. denied*,

[5] Whether or not the first opinion of the Court of Appeals constituted the law-of-the-case for the purposes of the second appeal, see *Interstate Commerce Commission* v. *United States Smelting, Refining and Mining*, 339 U.S. 186 (1950), it is, of course, not binding on this Court which has the power to review the entire case and all interlocutory decisions. See, e.g., *Hamilton Brown Shoe Co.* v. *Wolf Bros. and Co.*, 240 U.S. 251 (1915).

401 U.S. 948 (1971); *Sword* v. *Fox*, 446 F.2d 1091 (4th Cir.), *cert. denied*, 40 U.S. Law Week 3279 (1971). Second, it reflects a continued unwillingness to recognize that for constitutional purposes the university campus can no longer be treated as an insulated ivory tower immune from the full thrust of First Amendment protection. For all practical purposes, Southwest Texas State University is a small municipality of ten thousand student-citizens. Accordingly, it cannot be governed by rules which would be unconstitutional if enforced by the community at large; nor can it punish conduct which would be protected outside the campus. In the following respects the decision below ignores these principles.

**1. The petitioners' conduct was constitutionally protected.**

It is conceded that the petitioners intended to and did engage in a peaceful, silent protest against the war. They sat on the grass in an open area of the campus. They obstructed no traffic and they themselves caused no noise or disturbance. Their activity involved no mass numbers of demonstrators, and no patrolling or marching. Compare, *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Hammond* v. *South Carolina State College*, 272 F. Supp. 947 (D. S.C. 1967). This was First Amendment activity akin to pure speech, and, like the "passive, silent expression of opinion" in *Tinker*, it was entitled to a high order of constitutional protection.

The respondents offered two justifications for withholding such protection, both based not on apprehension about what the petitioners would do, but on fears of the audience reaction.

First, the university claimed it was concerned with its ability to protect the petitioners against a hostile audience. Petitioners submit that no significant showing of any such possibility had been made.[6] But even assuming otherwise, time and again this Court has made it clear that a hostile audience cannot effect such a veto of speech and assembly. See, e.g., *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Edwards* v. *South Carolina, supra*; *Cox* v. *Louisiana*, 379 U.S. 536 (1965) ("... constitutional rights may not be denied simply because of hostility to their assertion or exercise ..." *Id.* at 551); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970) ("... the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers ... or simply, because bystanders object to peaceful and orderly demonstrations." *Id.* at 567). It is particularly significant that in *Tinker* this Court expressly relied upon *Terminiello* and its progeny, strongly reaffirming that the heckler's veto is no more acceptable on the campus than on the street. Those students who resented the petitioners or their message should have continued on their way. That the respondents feared they would do otherwise cannot constitutionally serve as the basis for interdicting the petitioners' rights. See *Jones* v. *Board of Regents of the University of Arizona*, 436 F.2d 618, 621 (9th Cir. 1970); *Butts* v. *Dallas Independent School District*, 436 F.2d 728 (1971).

Second, the respondents expressed the concern that the demonstration would distract classes by attracting a noisy

[6] During the October demonstration some words had been exchanged between the petitioners and certain ideological opponents, notably the Rodeo Association (T. 73-74). Some threats reportedly had been made against the Moratorium group. However, the fact that respondents did offer to allow the demonstration between 12 and 1 o'clock undercuts this claim.

crowd of onlookers. Even assuming that petitioners can be held accountable for the conduct of the onlookers, nevertheless the noise did not cause material and substantial interference with the University's activities. See *Tinker* v. *Des Moines Independent Community School District*, *supra*. And it is settled that when, as here, an area is generally open to the public, First Amendment activities can be regulated only to the extent that they cause such a significant level of interference with the normal use of the facility. See *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968). Slight inconvenience, annoyance or interference cannot provide a basis for abridging peaceful protest. See *Schneider* v. *State*, 308 U.S. 147, 162 (1939). Presumably, the office workers at the state capitol in *Edwards*, not to mention the librarian in *Brown* v. *Louisiana*, 383 U.S. 131 (1965), were significantly more distracted by those demonstrations than the few students and professors were here.[7]

Finally, Judge Thornberry relied on a third reason for denying constitutional protection to the petitioners' activities, namely, that the Dean had not attempted to prohibit the demonstration, but to merely regulate its time and place. Indeed, he even offered the use of the Statue area, but during the noon hour.[8] However, if as petitioners contend, there was no valid reason for denying them the forum they chose, then administrative willingness to offer an al-

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[7] There are indications in the record that the crowd of onlookers swelled after the Dean arrived, and it is possible that the crowd was primarily interested in watching him discipline the petitioners. Surely the suspension cannot be justified if its effectuation caused the very disruption which was anticipated.

[8] The Moratorium leadership was unaware of the offer. See p. 6, fn. 4, *supra*.

ternative forum is unavailing. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Jones* v. *Board of Regents of the University of Arizona, supra* at 622 (quoting from *Schneider* v. *State, supra* at 163). Moreover, freedom of expression contemplates the most effective communication possible, consistent with legitimate state interests. See, *Davis* v. *Francois*, 395 F.2d 730 (5th Cir. 1968); *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). The right to conduct a silent outdoor vigil at 10:00 A.M. cannot be infringed because state officials would prefer it be held at noon.

**2. The "student expression area" regulation provided no valid basis for the suspension.**

The regulation which petitioners purportedly violated limited "student expression" to one designated area and only at certain specified times. The majority opinion below, repeating the "time, place and manner" litany, concluded that this was a valid, non-discriminatory regulation and that petitioners were suspended solely because they violated it. But this was no even-handed traffic rule designed to insure that no more than one activity would be scheduled at a particular place and time. At the very outset, it singles out First Amendment activity for regulation. It was not applied to other activities, such as barbecues and pep rallies, which could certainly pose substantial traffic or disruption difficulties. See *New Left Education Project* v. *Board of Regents of the University of Texas System*, 326 F. Supp. 158 (W.D. Tex. 1970), *rev'd on other grds.*, —— U.S. ——, 40 U.S. Law Week 4167 (1972). Moreover, as

Judge Thornberry concluded, the rule restricts student assemblies to "so small an area and so brief a time as to be unreasonable if strictly enforced." App., *infra*, p. 20a. Cf. *Davis* v. *Francois*, *supra* (invalidating an ordinance which limited picketing to two people). Indeed, the student expression area resembles "an area that a benevolent government has provided as a safe haven for crackpots." *Tinker* v. *Des Moines Independent Community School District*, *supra* at 513.

In addition to being unreasonably restrictive of First Amendment rights, the regulation is too vague and uncertain to allow the imposition of punishment for transgressing it. Its very language is permissive, not prohibitive. There is no definition of "student expression", nor are any penalties specified. The regulation is the paradigm of the law that is so imprecise that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). In the First Amendment area, such rules are intolerable.

Finally, the vagueness of the law, the uncertainty of its application, and the complete lack of standards to guide the administrator combine to foster the type of "virtually unbridled discretion" which "subjects the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective and definite standards to guide the licensing authority." *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-151 (1969). Indeed, the Dean himself offered to allow the demonstration at a time and in a place unauthorized by the regulation. The availability of such discretion to regulate freedom of expression, characterized

below as "admirable . . . flexibility," is inconsistent with the precision required by the First Amendment.

In sum, the "student expression area" regulation was a constitutionally defective basis for suspending these petitioners.

## CONCLUSION

**For the reasons set forth above, the petition for a writ of certiorari should be granted.**

Respectfully submitted,

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March 21, 1972

# APPENDIX

# APPENDIX

## Order of the United States District Court for the Western District of Texas Denying Preliminary Relief

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

Civil Action No. A-69-CA-143

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DAVID BAYLESS, ET AL.

vs.

FLOYD MARTINE, ET AL.

---

ORDER

It is true, that no party to this suit denies, that the First Amendment applies with full vigor on the campus, but it is equally clear and established that a university, by reasonable regulation, can limit and regulate the exercise of rights guaranteed by the Constitution and Laws of the United States to persons generally. The First Amendment grants rights of free speech and assembly, but, the university in exercising its rights and duties on the university campus (as a populated community) can make reasonable regulatory requirements as to time and place of student protest and demonstration. The First Amendment guarantee is no bar to regulation of this kind.

To hold otherwise would be to put the stamp of legality and approval on deliberate and wilful disruptive action on the part of those dissidents and demonstrators who would, if possible, make havoc and a shambles of the orderly processes and functions of a university's educational process.

It appearing that the plaintiffs have exhausted their administrative remedies and that there is a gravely serious question that plaintiffs could prevail on the merits as reflected by the record in this hearing, the prayer for temporary injunction should be denied, and IT IS SO ORDERED.

Signed at Austin, Texas, this 4th day of December, 1969.

JACK ROBERTS
*United States District Judge*

## Stay Granted by United States Court of Appeals for the Fifth Circuit

DAVID BAYLESS ET AL.,

*Appellants,*

v.

FLOYD MARTINE ET AL.,

*Appellees.*

No. 28865

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Dec. 12, 1969

Mark Z. Levbarg, Brooks Holman, Austin, Tex., for appellants.

Crawford C. Martin, Atty. Gen. of Texas, James C. McCoy, W. O. Shultz, Pat Bailey, Asst. Atty. Gen., Nola White, First Asst. Atty. Gen., Alfred Walker, Executive Asst. Atty. Gen., J. C. Davis, Asst. Atty. Gen., Austin, Tex., for appellees.

Clark, Thomas, Harris, Denius & Winters, Edward Clark, Austin, Tex., for appellee, Board of Regents, State Senior Colleges.

Before:

WISDOM, COLEMAN, and SIMPSON,

*Circuit Judges.*

ORDER

PER CURIAM:

On December 5, 1969, the appellants moved for an expedited hearing on appeal and for appropriate relief pending disposition of the appeal. On the same day the appellees were notified of the motion and given an opportunity to respond.

Upon review of the record, including the transcript of the hearing upon the preliminary injunction, and considering the injury that the appellants will suffer if they are suspended from Southwest Texas State University, it is ordered that the denial of preliminary injunction by the Court for the Western District of Texas, Austin Division, be stayed and that the appellees herein be enjoined from suspending the appellants from Southwest Texas State University pending the disposition of this appeal and subject to further orders of this Court.

COLEMAN, *Circuit Judge.*

I respectfully dissent from the entry of the foregoing order.

With deference to the views of my Colleagues, I am of the opinion that no substantial First Amendment question is presented by this case. Southwest Texas State University made no effort to interfere with the free expression of opinion; rather, it attempted to control its own campus to the extent of designating the time and the area in which the demonstration was to occur. The students flouted this effort and held the demonstration when they pleased and where they pleased. I believe that the University authorities had the right to specify time and place for this demon-

stration so as to avoid undue interference with the rights of 9,500 other students.

Furthermore, I dissent for reasons of sound public and judicial policy. I am opposed to the courts taking over, by emergency orders, the administration of college campuses in this Country, especially where, as here, the petitioners have had an evidentiary hearing before the District Court and have there been denied any relief.

## Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28865

---

DAVID BAYLESS, ET AL.,

*Plaintiffs-Appellants,*

versus

FLOYD MARTINE, DEAN OF STUDENTS, SOUTHWEST TEXAS STATE UNIVERSITY, ET AL.,

*Defendants-Appellees.*

---

*Appeal from the United States District Court for the Western District of Texas*

(June 24, 1970)

Before:

THORNBERRY, DYER and CLARK,

*Circuit Judges.*

CLARK, *Circuit Judge*:

As a result of participation in a Viet Nam Moratorium demonstration in November 1969, ten students of Southwest Texas State University (SWT) were suspended. The students initiated an action in the district court seeking temporary, preliminary and permanent injunctive relief

prohibiting their suspension and other disciplinary measures; a declaratory judgment that the University regulation under which they were suspended was overbroad and a prior restraint on freedom of speech and assembly; and monetary damages. The district court declined to grant the temporary restraining order or a preliminary injunction. This interlocutory appeal ensued.[1] The district court's denial of the preliminary injunction was stayed and the college was enjoined from suspending the appellants by a panel of this court, pending determination of the merits of this appeal. *Bayless* v. *Martine*, —— F.2d —— (5th Cir. 1969) [No. 28865, December 12, 1969]. After full briefs and argument, we find that the district judge did not abuse his discretion in refusing to grant the preliminary injunction; therefore we vacate the actions previously taken by this court and remand the cause for further proceedings.

The Viet Nam Moratorium, a nationwide movement to provoke and promote demonstrations against the war in Viet Nam, held its first public protest on October 15, 1969. The SWT segment of this October event was to consist of an hour long program of short speeches. Because of the nature of the program it was felt that an auditorium would best meet the needs of the group. The college officials authorized the program to take place in the Fine Arts Auditorium from 11:00 A.M. to 12:00 Noon. Without authorization and contrary to regulations, demonstrations were held from 10:00 A.M. to 11:00 A.M. and from 12:00 Noon to 1:15 P.M. in the Huntington Statue area which is located between two classroom buildings. Both faculty and students subsequently complained that the demonstrations at these hours in the statue area disturbed and disrupted

[1] 28 U.S.C.A. § 1292(a) (1) (1966).

regularly scheduled classes. The Moratorium group's overall national plan called for successive monthly demonstrations of increasing length until the war in Viet Nam was settled. The November 13, 1969 event for which the SWT appellant-students before us today were suspended was the second of these projected moratoria.

The Students' Rights chapter of the SWT handbook, known as "Hill Hints", contained a regulation governing the holding of meetings on campus which had been adopted by The Student Rights Committee of the Student Senate. The text of the regulation follows:

"STUDENT EXPRESSION AREA

Students and University personnel may use the Student Expression Area located on the grass terraces in front of Old Main between the hours of 12:00 noon to 1:00 p.m., and from 5:00 to 7:00 p.m. Reservations for the Student Expression Area are made through the Dean of Students Office and must be made at least 48 hours in advance.

Rules to be observed by users of the area include:

1. No interference with the free flow of traffic.

2. No interruption of the orderly conduct of University affairs.

3. No obscene materials.

4. Person making the reservation is responsible for seeing that the area is left clean and in a good state of repair.

When a registered student organization plans to invite a non-University person to address a meeting,

his name must be submitted to the Dean of Students Office at least 48 hours before the event."

The area specified in the regulation is centrally located on the University campus and is surrounded by classroom buildings. This handbook also contained a detailed chapter entitled, "Student Discipline and Conduct Code."[2] The appellant-students refused the administrative disposition

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[2] Some pertinent provisions are:

"Sec. 101. Purpose

(A) A student at Southwest Texas State University neither loses the rights nor escapes the responsibilities of citizenship.

* * *

"Sec. 204. Administrative Disposition of a Major Violation

* * *

"(B) A student may refuse administrative disposition of his alleged major violation and on refusal is entitled to a hearing under Chapter 300. If a student accepts administrative disposition, he shall sign a statement that he understands the violation charges, his right to but waiver of a hearing, the penalty imposed, and his waiver of the right to appeal.

(C) In administratively disposing of a major violation, the Dean of Men and/or Dean of Women may impose any disciplinary action authorized under Section 601 (A) 9, 10, or 11.

* * *

"Sec. 601. Authorized Disciplinary Penalties

(A) The Dean of Men and/or Women, under Sections 203 and 204, or the Student Personnel Discipline Committee, under Section 304, or the Faculty-Student Board of Review, under Section 403, may impose one or more of the following penalties for violation of a Regents' rule, University regulation, or administrative rule:

* * *

"(10) suspension from the University"

of their cases and received the full hearing which this Code assured.

The local group sponsoring the SWT moratoria had, on a number of occasions between November 4 and November 13, discussed plans for their November activities with the college administration. The Moratorium group insisted that they again wanted to hold a demonstration at the Huntington Statue area of the campus. The group further adhered to their requirement that the demonstration must take place from 10:00 A.M. until 2:00 P.M. Thus both the place and the time demanded by the Moratorium group were outside of the Hill Hints regulation quoted above.

University personnel endeavored to secure an auditorium so that the demonstration could be held inside but no auditorium was available. The college officials also offered to permit the demonstration to be held at the statue area if it was limited to the hour between 12:00 Noon and 1:00 P.M. Classes were scheduled to be and were in progress on this particular day in the classroom buildings which adjoined the statue area. No attempt was made to show that the student expression area defined in the regulations was not available to the group during the hours provided for therein. With explicit knowledge that they were acting contrary to the University's general regulation and the particular directions of the University officials who worked with them, the second Moratorium demonstration began at the statue area at approximately 9:45 A.M. on November 13. An estimated fifty demonstrators congregated in the area at the outset, but after Appellee Martine, Dean of Students of SWT, arrived and told the demonstrators to leave only ten refused and remained. They are the appellants here. There is no conflict in the evidence nor is any issue raised

concerning the demonstrators' conduct. They sat upon the grass. They intended to be and were silent until the time of their suspensions. They had caused no injury to property themselves. They had attracted a crowd of on-lookers.

Despite the initial orderliness of the November demonstration, the officials of SWT testified that based upon their October experience they did not believe that they could preserve order if the demonstration were allowed to continue during the four hours planned in the middle of the academic day at this place on the campus. Some class disruptions had in fact already begun to occur at the time Dean Martine acted. The demonstrating group had been warned in advance that violation of regulations would result in disciplinary action. After the demonstration actually started Dean Martine specifically warned the students that if they continued to violate the University's regulations they would be suspended until the Fall 1970 term. He then gave them a reasonable opportunity to desist. Only those who would not leave the prohibited demonstration site were suspended. The suspensions began on November 13, 1969 and were interdicted by this Court's interim injunctive order.

Plaintiffs have not attacked the procedures by which they were disciplined under the rules laid down in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). The sole object of their attack before the court below and on this appeal is the validity of Hill Hints regulation quoted above.

The broad standard applicable to appellate review of a district court's denial of preliminary injunctive relief is measured by a strict test which disregards whether this court would have exercised its discretion to deny the injunction and looks only to determine whether the district

judge clearly abused *his* discretion in acting as he did. *Allen* v. *Mississippi Commission of Law Enforcement*, —— F.2d —— (5th Cir. 1970) [No. 28716, April 7, 1970]; *Ferrell* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968); *Blackwell* v. *Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966); *Detroit Football Company* v. *Robinson*, 283 F.2d 657 (5th Cir. 1960); 7 Moore's Federal Practice ¶ 65.04 [1] & [2] (2d ed. 1966). In testing this discretion we must take into account the status of each of the parties, the respective effects which the denial or grant of the injunctive relief requested would have on these parties and upon any broader interests which might be affected—particularly public interests, the proof offered in support of and against the grant of such relief and the correct legal standards to be applied. All of these factors play a part in what is basically a balancing of the conveniences of the parties and the possible injuries to them according as they may be affected by the granting or withholding of the injunction. *Yakus* v. *United States*, 321 U.S. 414, 64 S. Ct. 660, 88 L.Ed. 834 (1944). Some circuits have aptly expressed the equation as "a flexible interplay between the likelihood of irreparable harm to the movant and the court's belief that there is a 'reasonable certainty' (or probability) that the movant will succeed on the merits at a final hearing." *Packard Instrument Company* v. *ANS, Inc.*, 416 F.2d 943, 945 (2nd Cir. 1969); *Checker Motors Corporation* v. *Chrysler Corporation*, 406 F.2d 319 (2nd Cir. 1969); *Crowther* v. *Seaborg*, 415 F.2d 437 (10th Cir. 1969).

The order denying the preliminary injunction in the case sub judice stated in part: "There is a gravely serious question that the plaintiffs could prevail on the merits as reflected by the record in this hearing." Thus the district

judge was, as we are, not convinced after the preliminary hearing that the plaintiffs had made a prima facie case showing that the Hill Hints regulation was unconstitutional on its face or in its application to them, thus they had not demonstrated that their ultimate right to the relief sought was reasonably probable.

There was no showing that the University Administration in any way attempted to sidetrack the demonstration because of its subject matter. In argument before the court counsel for appellants admitted that the college had shown no animus toward the demonstrators or their cause. The October 15th demonstration had taken place without disciplinary action by the college—even though it was in violation of the above regulation and caused academic disturbance. The administration attempted to work out an agreeable time and place for the November demonstration which would permit it to be effective and at the same time have a minimal impact upon the essential educational functions of SWT. These facts when linked with the expectation that the demonstration was to be only one in a series of recurrent, increscent events impels the conclusion that the University officials acted reasonably to balance the interests of the majority of students in the maintenance of an academic atmosphere conducive to the pursuit of their chosen studies against the unquestioned rights of those who wished to demonstrate their views against the war in Viet Nam. Cf. *Bachellar* v. *Maryland*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (1970) [No. 729, April 20, 1970, 38 L.W. 4316].

Appellants contend that the Hill Hints regulation on its face amounts to a prior restraint upon the exercise of First Amendment rights. It cannot be read so broadly. The requirement of reserving the Student Expression Area

48 hours in advance is a reasonable method by which the problem of simultaneous and competing demonstrations could be avoided. While a university could be required under appropriate circumstances to permit both the Students for a Democratic Society and the Young Americans for Freedom to demonstrate, no one could reasonably contend that the Constitution required the college to permit such demonstrations to take place at the same time and in the same area. Another alternative is that advance notice may reasonably be required so as to permit the college to provide police protection for both the demonstrators and University property.

The Student Expression Area regulation in Hill Hints is a valid exercise of the University's right to adopt and enforce reasonable, non-discriminatory regulations as to the time, place and manner of student expressions and demonstrations. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell* v. *Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966); see also C. A. Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027 (1969).

These students certainly have no standing to complain that the 48-hour notice period as applied adversely affected them. They were dealing with the University officials concerning a continuing series of demonstrations and had the subject November demonstration under actual consideration and discussion with University officials for nine days.

We think appellants underscore rather than undermine the reasonableness and constitutionality of the regulation by pointing out that it is permissive and that the University had no codified prohibition which would make the statue area (or any other campus areas) unavailable for student

demonstrations. When this is coupled with the administration's prior and present efforts to allow these very students maximum freedom of expression consistent with its duty to operate the college as an educational institution, we think it underscores the validity of having a regulatory minimum. A regulation governing conduct on a university campus is not a criminal law. It also bears noting that the minimum was set by the students themselves through their peers acting in the Student Senate.

The students now before us are mistaken in characterizing the admirable degree of flexibility displayed by the college administration in offering additional places and times to those specified in the Hill Hints regulation in a futile attempt to meet their demands, as some form of ad hoc action. The University's compliance stands in stark contrast with their intemperate insistence that they would hold their activities when and where they pleased despite the regulation and particular directions to the contrary. Since the prescribed minimum was sufficient, the administration's willingness to go the extra mile was clearly a virtue not a fault.

Appellants place great reliance upon the fact that the demonstration was silent and did not disrupt classes. There is evidence to the contrary. In any event we do not regard the nature of the demonstration as significant in the instant case, for in this case, unlike *Tinker, Burnside* and *Blackwell* these students violated a general standing campus regulation valid on its face. In *Tinker, Burnside* and *Blackwell* special ad hoc regulations were involved which were devised to specifically restrict the wearing of the arm bands or buttons there involved. In those cases the Supreme Court and this Court held it was significant that the proscribed conduct either was (*Blackwell*) or was not

(*Tinker* and *Burnside*) causing and contributing to a disruption in the normal activities of the schools involved. Obviously, the test for determining the validity of an ad hoc regulation would be stricter than the test for a general one, which does not carry the inherent possibility that it might be directed against the views espoused under the pretext of preserving campus order. The campus handbook was promulgated and published before the first Moratorium demonstration was held. On its face it is applicable to all sorts of expressions by students, from the proverbial demonstrations against food in the school cafeteria, Saturday classes, or the war in Viet Nam. Certainly the right to express one's views freely concerning the quality of cafeteria food is to be held no less sacred under the First Amendment than the right of free expression of one's views about war. When a general regulation such as that contained in Hill Hints had been made explicitly applicable to the students here involved and they had been fully apprised of the penalty to be meted out for violation of the regulation not only by the Dean's direct statements to them but by the express provisions of the Student Discipline and Conduct Code, which was printed and distributed as a part of the Hill Hints handbook, then the University's right to discipline an erring student is not contingent upon the extent of disruption caused by his direct disobedience of the regulation. A speeding motorist may not escape penalty on the grounds that his speeding has not caused damage to person or property. Since these students demonstrated no more than that they were suspended for violating a valid regulation, the absence of damage is equally irrelevant.[3]

[3] Judge Thornberry's concurrence indicates the need for a brief additional explication of the basis of the University's action. The student-appellants could have been disciplined for failure to abide

On this interlocutory appeal from the refusal of the district court to grant a preliminary injunction, we hold only that the district court did not abuse its discretion. Our application of principles in the foregoing discussion is limited to the pleadings and the record facts now before us. When this case is ultimately fully developed on its merits, facts may appear which require a different application of law or raise different equities. Therefore, we intimate no view as to what the ultimate outcome of the case should be.

Since appellants failed to make out a prima facie case demonstrating a reasonable probability of success on the merits a fortiori they did not make that even stronger showing that is prerequisite to the grant of a stay and the issuance of an injunction pending a hearing on the merits of an interlocutory appeal. *See Pitcher* v. *Laird*, 415 F.2d 743 (5th Cir. 1969); and *Belcher* v. *Birmingham Trust Nat. Bank*, 395 F.2d 685 (5th Cir. 1968). Therefore, this Court's prior stay and injunction order of December 12, 1969 in this cause must now be vacated.[4]

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by the University administrators' grant of permission to use the Huntington Statue area at a different hour, but the record shows that this and all other alternative means of demonstrating their protest of the war in Viet Nam were flatly rejected by these students. When Dean Martine confronted the demonstrating students his warning to disperse or face suspension and other penalties adverted only to their violation of student handbook regulations and not to breach of the more relaxed permissions offered by the Dean and other officials. The charge against them at the academic disciplinary hearing was based upon their failure to comply with the Hill Hints "Student Expression Area" provisions set out above. The complaint in the district court focused squarely upon the application of this handbook provision to the students and attacked its validity. This was the case made, it was the case tried and must, in our opinion, be the subject of this review.

[4] Appellants made no showing that they had applied to the district court for a stay or injunction pending appeal, pursuant to

One further point remains. During the pendency of this interlocutory appeal appellants moved this court for further relief to broaden the injunction heretofore granted so as to order SWT to record and transcribe appellants' grades for the Fall semester 1969-70. We assume that this motion would also cover the Spring semester of this term, which has commenced while the appeal has been pending. This presents a complicated question of law and equity which this court is not prepared to deal with on the basis of the limited record before it. The injunction granted pending the hearing of this appeal on its merits now proves to have been improvidently granted. An injunction to which a party is not entitled can confer no rights upon him. Cf. *Hyde Construction Company, Inc. v. Kochring Company*, 388 F.2d 501 (10th Cir. 1968), *cert. den.* 391 U.S. 905, 88 S.Ct. 1654, 20 L.Ed.2d 419 (1968). Thus the appellants have attended SWT at the peril of predicting the ultimate outcome of this appeal. Their rights to grades, the college's right to retain any tuition payments made, the ability of the college to impose equivalent suspensions in future years (we are advised some of the students are seniors and may have completed their college courses by the time this case is remanded) are some of the factors which readily come to mind that may play a part in the ultimate resolution of the respective rights of the parties. It may be that the college administration would now think it best to substitute some other form of discipline. It may also be that the

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Rule 8, F.R.A.P. While such a failure is not a jurisdictional defect [See Cumberland Tel. & Tel. Co. v. Public Service Comm., 260 U.S. 212, 43 S.Ct. 75, 67 L.Ed. 217 (1922)], we do not believe it should have been bypassed in the case at bar. It does not follow from the refusal to grant a preliminary injunction pending a trial in the court below that the district court would refuse injunctive relief pending an appeal.

district court will feel it more appropriate to withhold any action until the case has been finalized on its merits. At least it is clear that on the record before us now we should not attempt to resolve the issue. In the interest of justice, Appellants' motion for further relief is remanded with the cause to the district court.

INTERIM STAY AND INJUNCTION PENDING APPEAL VACATED. AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

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THORNBERRY, *Circuit Judge*, concurring:

I concur in the result reached by the Court today, but for a different reason from that put forth by the majority. In my opinion, the conduct of these demonstrators could not be considered a violation of the student expression area rule set out at page 70 of the University publication "Hill Hints," because that rule merely specifies a time and place at which student demonstrations *may* be held but does not prohibit demonstrations at any other time and place.[1] If

[1] The rule relied upon by the majority states that "Students and University personnel may use the Student Expression Area located on the grass terraces in front of Old Main between the hours of 12:00 noon to 1:00 p.m., and from 5:00 to 7:00 p.m." Thus the rule is permissive only. The evidence indicates that the administration has always interpreted it as permissive and has regarded all other parts of the campus and all other times as subject to some degree of discretion for the protection of University functions.

The majority relies upon the rule to distinguish the case of *Tinker* v. *Des Moines Independent School District*, 1969, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731. The rule is thus an essential step in the reasoning of the majority, because it allows the avoidance of the question whether there was a danger of "material and substantial disruption" of University functions. I question the propriety of distinguishing *Tinker* by stretching a rule that does not seem to me to cover the case. To my mind, *Tinker* is inapplicable anyway because it involved a substantial impairment of the plaintiffs' expression of ideas, and no such impairment is occasioned in this case because the University furnished adequate alternative forums.

the rule can be construed so as to apply in a prohibitive manner to these circumstances, then I think its validity doubtful.[2] At the same time, I find it unnecessary to rely upon the rule to hold the suspensions valid. I find from a study of the record that Dean Martine's directions to the students were reasonable and lawful. Regulations issued ad hoc to particular students concerning their expression of ideas must meet a higher standard than codified rules, but I find that the dean's action in this case met the standard. The dean's directions did not prohibit the students from holding their demonstration, but merely regulated the time and place at which that demonstration could be held. My concurrence is therefore based upon my judg-

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[2] In my judgment, the only way in which the rule can be interpreted so as to avoid the discretionary nature of the University's action in this case is to say that it prohibited demonstrations at all other times and at all other places than those specified in the rule. This interpretation might make the rule invalid for several reasons. First, it requires a real stretch of the imagination to infer this meaning from the language of the rule. Second, the rule was not so construed when applied to other student assemblies, and it would be discriminatory so to construe it in this case. Third, it would restrict student assemblies to so small an area and so brief a time as to be unreasonable if strictly enforced.

By tacitly allowing loose construction of the regulation on the ground that it is a university rule governing student conduct, the Court proceeds upon assumption and without discussion into a difficult new area of the law. The courts that have held that such rules are not subject to the usual standards of specificity required of laws regulating conduct off the campus have been severely criticized by the commentators. *Compare General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133, 146 (W.D. Mo. 1968) with Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027 (1969). Even if this view should prevail, rules concerning first amendment rights on campus should probably be subject to a stricter construction. At any rate, the rule in this case need not be examined by the Court, because there was no denial of first-amendment rights by the reasonable directions issued by the dean.

ment that the demonstrators knowingly and intentionally violated a lawful direction of the Dean of Students that prohibited them from using this particular time and place for their demonstration, after being specifically warned by the dean that they would be suspended if they persisted in this particular course of action.

The students were suspended because of their failure to obey the dean's suggestion that they occupy the very area they occupied, but at a different time. Had they used the statue area, from noon to one o'clock, the time that the dean suggested, rather than insisting upon occupying it from ten o'clock on, a time that the dean specifically prohibited, they would not have been suspended. This suggestion shows a real effort to accommodate the wishes of the demonstrators. And the efforts of the administration to protect the rights of the demonstrators were even more extensive than this. These efforts were reflected in numerous communications between the dean and the demonstrators before the date of the demonstration, in which several alternatives were explored and suggested by the administration but rejected by the demonstrators. The time and place set out in the student expression area rule was always available to the students; the dean alternatively proposed a way in which they could lawfully use the very place they used; and the administration advanced other possibilities, including the use of an auditorium at times when space was available. It appears from the evidence that the University would have been amenable to reasonable suggestions from the students themselves as to when and where they could hold their demonstration, so long as it could be accommodated to the University's activities. Thus the record shows a good-faith attempt by

the administration of the University to set up a time and place that would allow the demonstrators their first-amendment rights while at the same time preventing the demonstration from interfering with the functions of the University.

The crucial fact in this case is that the University did not prohibit this demonstration. It merely regulated the time and place at which it could be held. At this time, it requires no citation to say that the University was authorized to regulate the time, place and manner of conduct on the campus provided its regulations were reasonable. A University is a dynamic, active institution that consists of large numbers of people crowded in a small space, so that it can function only if those people obey rules regulating the time, place and manner of their activities. The administration, in its turn, is required to make every reasonable effort to accommodate the freedom of expression of all students with the functions of the University, but this effort must be made under constantly changing conditions and in response to changing interests. Perfect congruence with the intentions of all students cannot be expected. Even a carefully drafted set of rules, although it can go far toward reducing conflicts, cannot solve all the University's problems. Therefore, so long as the administration protects freedom of expression without substantial impairment, it must be afforded the flexibility to issue ad hoc directions specifying the time, place and manner in which particular activities are to be held and the right to expect that these directions will be followed. The administration may even be justified in issuing a regulation that impairs some expression if that regulation is absolutely necessary to prevent material and substantial disruption of its lawful

functions,[3] and consequently when it has actually protected the right to expression by furnishing adequate alternative forums, as the University did in this case, its actions are lawful.

For these reasons, it seems to me that the trial court correctly held that the plaintiffs had not shown a sufficient probability of prevailing on the merits to qualify them for a preliminary injunction under the circumstances.

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[3] *See Tinker* v. *Des Moines Independent Community School District*, 1969, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731; *Burnside* v. *Byars*, 5th Cir. 1966, 363 F.2d 744; *Blackwell* v. *Issaquena County Board of Education*, 5th Cir. 1966, 363 F.2d 749.

## Final Decision of the United States District Court for the Western District of Texas

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

Civil Action No. A-69-CA-143

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DAVID BAYLESS, *et al.*

vs.

FLOYD MARTINE, *et al.*

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MEMORANDUM OPINION AND ORDER

Plaintiffs were suspended from Southwest Texas University for their participation in a campus demonstration on November 13, 1969. Following a similar Vietnam Moratorium demonstration during the previous month, the University had received complaints from students and faculty that attendant noise and confusion interfered with teaching, and actually caused the dismissal of some classes. Because of this disruption, University officials expressed a desire in meeting with Moratorium group representatives that any future protest be conducted at a proper time and place. In accord with this concern, the students were offered alternative locations for their November protest. One of these locations was the very spot for which

the students proposed their demonstration, but at a time during the noon hour when no classes were in session.

Rejecting these reasonable offers by the University, the students persisted in their original plans to hold a demonstration at a time and place which the University had reason to believe would result in a repetition of the October class disruptions. Furthermore, the students persisted despite their own expression of concern and that of University officials that a violent confrontation might be brought on by other campus organizations opposed to the Moratorium.

Prior to the protest, the Dean of Students, Floyd Martine announced both orally and by letter that the demonstration as planned was unauthorized by a University regulation. As the illegal demonstration began on November 13, 1969, Dean Martine read a further statement to the group. Most of the demonstrators dispersed, but these ten plaintiffs again persisted. Only after these repeated warnings did the Dean take action to suspend the dissidents.

Plaintiffs initially came before this Court on a motion for a temporary restraining order and preliminary injunction to block their suspensions. In denying such relief this Court noted that the First Amendment is no bar to "reasonable regulatory requirements as to time and place of student protest and demonstration." Bayless v. Martine (No. A-69-CA-143 December 4, 1969).

After staying this Court's denial of the preliminary injunction, Bayless v. Martine, 430 F.2d 782 (5th Cir. 1969), the Court of Appeals ultimately vacated its stay order in an opinion by Judge Clark which upheld the validity "of the University's right to adopt and enforce reasonable, nondiscriminatory regulations as to time, place, and man-

ner of student expressions and demonstrations." Bayless v. Martine, 430 F.2d 873, 878 (5th Cir. 1970). In light of this decision there can be no question as to the reasonableness of this regulation or its application to this activity.

Indeed, the additional testimony adduced at the hearing on the merits of this case only reaffirms this Court's view that the plaintiffs knowingly violated a reasonable University regulation. No new evidence or authorities were presented which questioned the reasonableness of the University's actions. Nor did Plaintiffs elaborate on their contention that they had been denied the right of cross examination in the hearing which followed their suspensions.

Instead plaintiffs sought solely to obtain equitable relief through an order to the University to transcribe their grades during the pendency of this suit. While such relief may be desirable, it cannot be granted without destroying the meaning of Judge Clark's opinion. As that decision concluded,

> An injunction to which a party is not entitled can confer no rights upon him .... Thus the appellants have attended SWT at the peril of predicting the ultimate outcome of this appeal. 430 F.2d 873, 880.

Recognizing that the integrity of a University's academic processes must be maintained, plaintiffs prayer for relief should in all thing be denied, and IT IS SO ORDERED.

Signed at Austin, Texas, this the 18th day of January, 1971.

JACK ROBERTS
*United States District Judge*

## Per Curiam Decision of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1580

Summary Calendar*

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DAVID BAYLESS, *et al.*,

*Plaintiffs-Appellants,*

versus

FLOYD MARTINE, DEAN OF STUDENTS, *et al.*,

*Defendants-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(November 22, 1971)

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Before:

GEWIN, GOLDBERG, and DYER,

*Circuit Judges.*

PER CURIAM: AFFIRMED. *See Bayless* v. *Martine*, 5 Cir. 1970, 430 F.2d 873, 880 (Thornberry, J. concurring). See Local Rule 21.[1]

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

SUPREME COURT, U. S.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1207

DAVID BAYLESS, ET AL.,

*Petitioners*

v.

FLOYD MARTINE, ET AL.,

*Respondents*

## REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. --------

DAVID BAYLESS, ET AL.,

*Petitioners*

v.

FLOYD MARTINE, ET AL.;

*Respondents*

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

### Opinions Below

The trial court's opinions are unreported. The Court of Appeals opinions are reported at 430 F.2d 873, and 451 F.2d 561.

### Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 28 U.S.C. 1254(1).

### Questions Presented

1. Whether a public university may suspend students for participating in an outdoor, silent, peace vigil for the reasons that:

(a) it was held at a time and in an area unauthorized by university regulations and expressly forbidden by school officials;

(b) university officials allegedly feared a possibly hostile reaction from onlookers; and

(c) the onlookers might make noise distracting to classes in adjacent buildings.

2. Whether a university "student expression area" regulation, pursuant to which the petitioners were purportedly suspended, is defective under substantive and procedural First Amendment standards.

## Statutes and Regulations Involved

Regulations from student handbook set forth verbatim by Circuit Court at 430 F.2d 873 at 875.

## Statement of the Case

Respondents agree by and large with the Statement of the Case as set forth in Appellants' Petition, but submit the summary of the case as set forth in the trial court's Memorandum Opinion and Order of January 18, 1971, presents a very accurate summary of the nature of the case, and the legal proceedings which have preceded this appeal.

Respondents are unable to summarize the facts any better than did the trial court in its last Order, and therefore quote a part of said Order:

> "Petitioners were suspended from Southwest Texas University for their participation in a campus demonstration on November 13, 1969. Following a similar Vietnam Moratorium demonstration during the previous month, the University had received complaints from students and faculty that attendant noise and confusion interfered with

teaching, and actually caused the dismissal of some classes. Because of this disruption, University officials expressed a desire in meeting with Moratorium group representatives that any future protest be conducted at a proper time and place. In accord with this concern, the students were offered alternative locations for their November protest. One of these locations was the very spot for which the students proposed their demonstration, but at a time during the noon hour when no classes were in session.

"Rejecting these reasonable offers by the University, the students persisted in their original plans to hold a demonstration at a time and place which the University had reason to believe would result in a repetition of the October class disruptions. Furthermore, the students persisted despite their own expression of concern and that of University officials that a violent confrontation might be brought on by other campus organizations opposed to the Moratorium.

"Prior to the protest, the Dean of Students, Floyd Martine, announced both orally and by letter that the demonstration as planned was unauthorized by a University regulation. As the illegal demonstration began on November 13, 1969, Dean Martine read a further statement to the group. Most of the demonstrators dispersed, but these ten plaintiffs again persisted. Only after these repeated warnings did the Dean take action to suspend the dissidents."

Respondents agree with the summary of the court proceedings as set forth by Petitioners, pages 6-7 and 8.

## Argument and Authorities

Respondents submit the lower courts in this case have not ignored the announced principle in *Tinker v. Des Moines Independent School District*, 393 U.S. 503,

89 S.Ct. 733, 21 L.Ed.2d 731 (1969), but rather have applied such principles to the facts in the present case.

Respondents further submit that they have been unable to find a decision from any other circuit, which holds that a University or College may not have a reasonable regulation as to time, place and manner for student demonstrations. To do so, would be a failure to adhere to this court's prior pronouncement in *Tinker* that:

> "The Constitution says that Congress (and the states) may not abridge the right to free speech. This provision means what it says. *We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.*" (Emphasis added.) 393 U.S. 503, 513.

Petitioners contend that the activity in which they were engaging at the very instant that they were suspended was constitutionally protected and all that had occurred previously on campus, and the disruption that was occurring at the time of the second demonstration should have been ignored by the administration and the courts in this case.

In effect, Petitioners are asking this court to subscribe to the theory that the Constitution protects conduct viewed in a vacuum.

Professor Charles Alan Wright in a recent Vanderbilt Law Review article entitled, "The Constitution On The Campus," 22 Van.L.R. 1027-1088 (1969), discusses the history and present law relating to students' constitutional rights and responsibilities on and off campus. On page 1042 of his article, Professor Wright makes the following observation:

> "On the view I take of the matter, that the first amendment applies with full vigor on the campus, it is a false dichotomy to suggest, as some have,

that there are circumstances in which a university can limit or forbid 'the exercise of a right guaranteed by the Constituiton or by a law of the United States to persons generally.' I do not think such a conflict ever can arise, because I do not read the first amendment as granting rights in a vacuum, but rather as granting rights that exist at a particular time and place. 'The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.' To revert to an example I suggested earlier, a rule barring loud discussions in the reading room of the library does not limit 'the exercise of a right guaranteed by the Constitution . . . to persons generally,' for no one has a constitutional right to speak in a place so clearly inappropriate. *The nature of the University, and the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable*, but the first amendment is no bar to reasonable regulations of that kind." (Emphasis added.)

The lower courts in this case found no abridgement of first amendment rights, but rather ample testimony indicating a deliberate attempt to protest wherever and whenever they please. The Constitution does not protect such activity. *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

The Petitioners made an all out attack upon the student expression area rule (quoted verbatim by Circuit Court *Bayless v. Martine*, 430 F.2d 873 at 875). But the fact of the matter is, as pointed out by the Circuit Court, the Petitioners never made any attempt to use the designated area, and thus were unable to show the trial court that such an area was and is "an area that a benevolent government has provided

as a safe haven for crackpots," as alleged by Petitioners, and as claimed by them at present time.

## CONCLUSION

This Court has repeatedly held that first amendment exercise by students may be reasonably regulated by public school officials, and in this case the lower courts have adhered to such principle and found such reasonable regulation.

This Court should deny this Application for Writ of Certiorari.

Respectfully submitted,


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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Brief in Opposition, was served upon the Petitioners by placing same in the United States Certified Mail with sufficient postage attached and addressed to the attorneys of record for Petitioners, Mr. Mark Z. Levbarg, 807 Rio Grande, Austin, Texas 78701 and Mr. Melvin L. Wulf and Mr. Joel M. Gora, American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010.

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